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No. 80-104

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LULAC COUNCIL No. 11054, et al,

Intervenors-Petitioners,

vs.

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al,

Respondents,

and

RONALD BRADLEY, et al,

Respondents,

and

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, MICHIGAN, et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in affirming a denial of intervention to individual Spanish-surnamed children and Hispanic organizations who sought to assert the interest of Hispanic students in bilingual programs?

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DETROIT BOARD BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Board of Education Of The School District Of The City of Detroit and other named Detroit Board Respondents [Detroit Board], submit this Brief in Opposition to the Petition for Certiorari heretofore filed by the LULAC Intervenors.

The LULAC Intervenors challenge a decision rendered in this cause on April 14, 1980 by the United States Court of Appeals for the Sixth Circuit affirming the District Court denial of intervention. Their purported reason is the protection of bilingual education programs within the context of a desegregation plan to remedy prior racial discrimination.

While the Detroit Board took no position on the inter-

vention issue in the District Court and did not oppose intervention in the Court of Appeals, we do not believe the Sixth Circuit committed reversible error in affirming the District Court denial of intervention. As such, there is no justification, legal or otherwise, for the exercise of this Court's jurisdiction for certiorari.

A review of the record regarding this petition reveals that the Court of Appeals properly affirmed the denial of intervention while at the same time protecting the purported interest of the LULAC Intervenors by according them an *amicus* status in future remand proceedings to assist in evaluating any reassignments of Hispanic students.[1]

STATEMENT OF THE CASE

Respondents Detroit Board accept Petitioner LULAC Intervenors' statement of the case insofar as it sets forth the historical sequence giving rise to their petition. However, the Detroit Board cannot subscribe to their characterization of the trial court proceedings relative to the provision and implementation of bilingual education programs.

The District Court held evidentiary hearings in April and September, 1977 pursuant to the remand of the Sixth Circuit Court of Appeals for consideration of the efficacy of additional pupil reassignments using students from schools in Regions 1, 5 and 8 of the school district. *Bradley* v. *Milliken*, 540 F.2d 229 (CA 6, 1976). While the Court erroneously assumed that bilingual programs for Hispanic students in Region 2 (where the majority of limited English speaking Hispanic students reside) were resegregating that Region, the Court never "expressed strong reservations about the need to continue bi-

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[1] *Bradley* v. *Milliken*, [CA 34a]. References to the Sixth Circuit's opinion, as reprinted in the original Petition Appendix to the Detroit Board Petition, No. 80-48 are made as follows: [CA 1a, *et seq*].

lingual education programs as desegregation occurred."[2] [Tr, April 24, 1978 at 59-64].

The August 7, 1978 order of the District Court is the best evidence of the position of the Court with regard to the provision for bilingual/bicultural programs, within the context of the desegregation plan. The Court specifically ordered the Detroit Board to continue to provide such programs consistent with state law and the prior orders of the Court. Where proposed pupil assignments would have materially altered the current bilingual/bicultural programs, the Detroit Board was obligated to create new programs to maintain the current level of offerings. [76a-77a of Detroit Pet. App.]

On August 21, 1978, the Detroit Board filed its Proposed Pupil Reassignment Plan pursuant to the District Court order of August 7, 1978. The plan was intended to be implemented with a bilingual-sensitive assignment policy.

SUMMARY OF ARGUMENTS

While Petitioner LULAC's Motion to Intervene may arguably be found to be timely and not prejudicial to the existing parties, two reviewing Courts have determined, without contrary evidence being offered by Petitioners, that Petitioners' interest is adequately represented by existing parties resulting in no right to intervene.

The provision and implementation of bilingual education programs has never been and is not now an issue in this school desegregation case. The right to such programs and the Detroit Board's demonstrated concern for preserving those programs within the context of pupil transportation, has been acknowledged by the parties and fully protected by the District Court and the Court of Appeals. As such, the decision of the Court of Appeals affirming the District Court's denial

[2] LULAC brief at 3.

of intervention is not in conflict with any decisions of other circuits cited by Petitioners.

A review on Writ of Certiorari is not a matter of right but of judicial discretion, granted only when there are special and important reasons advanced. Petitioners have failed to set forth the threshold requirements for vesting jurisdiction in this Court.

ARGUMENT

I.

The Court of Appeals Did Not Err In Affirming The District Court's Denial Of LULAC Intervention.

While the Detroit Board does not question the general ability or desire of the LULAC Intervenors to represent the Hispanic interests in this case[3], we do not believe the Court

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[3] In a related inquiry, the question of the standing of the proposed organization intervenors was never argued. However, a review of the record indicates that the organizations failed to allege in their pleadings that they had suffered any individual harm as a result of the on-going desegregation requirements. Essentially their allegations amount to an "interest" in a pending lawsuit. A test of representative standing is whether the interests sought to be protected are arguably within the zone of interests to be protected by the statute or constitutional guarantee in question; that interest requires the party seeking review to be among the injured. *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150, 153 (1970); *Sierra Club* v. *Morton*, 405 U.S. 727, 731-732, 734-735 (1972).

Supposed expertise and long-standing interest in an issue is insufficient in itself to render an organization adversely affected or aggrieved for purposes of standing. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Sierra Club, supra*, 405 U.S. at 739. Even if the LULAC Intervenors had an interest which could be impaired and which was not being adequately represented by existing parties, intervention would only be proper for those who have

of Appeals committed reversible error in affirming the denial of intervention by the District Court.

Rule 24(a) of the FRCP states the basis for an intervention of right:

> "Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

While Petitioner LULAC's Motion to Intervene may arguably be found to be timely and not prejudicial to the exististing parties.[4] The Court of Appeals concluded that the interest purportedly sought to be protected by Petitioners was adequately represented by existing parties thereby giving no right to intervene. Specifically, the Court stated:

> "We agree with the district court that appellants have no right to intervene, . . . [W]e think appellants' interest is adequately represented by the Detroit Board. Dr. Felix Valbuena, the Director of Bilingual Education for the Detroit school system cautioned the court that reassigning Hispanic students out of Region 2 schools, let alone doing so indiscriminately, would jeopardize the district's ability to provide quality bilingual education as required by law." [Ca 33a-34a].

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standing to enter the litigation. *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974).

[4] The District Court expressly found the motion to be untimely and prejudicial. [LULAC App. at 3-4, 8].

Thus, while petitioners may well have a substantial interest in the provision of bilingual education programs for Hispanic students of limited English speaking ability, that interest has been found by two reviewing courts to be an interest which is properly and adequately represented by existing parties.

Contrary to the thrust of the petition, the need for the provision for an implementation of bilingual education programs has never been and is not now a viable issue in this school desegregation case. The right to such programs and the Detroit Board's demonstrated concern for preserving those programs within the context of the pupil reassignment component of the desegregation plan has never been questioned. Indeed, the Detroit Board was the party which initially raised the concern with the District Court that additional pupil reassignment, if not sensitive to the needs of Hispanic students of limited English speaking ability, might impact on the bilingual education program. In acknowledgment of that concern, the Court, in its August 7, 1978 Order requiring the Detroit Board to submit a plan for additional pupil reassignments, provided *inter alia*:

> "The plan shall make provisions for bilingual/bicultural programs consistent with state law and prior orders of this court; where pupil reassignment materially alters current bilingual/bicultural programs, the Detroit Board shall create new programs to maintain the current level of bilingual/bicultural offerings." [76a-77a of Detroit Pet. App.].

There has been no contention, and there is no evidence to sustain such a contention, that the Detroit Board violated the foregoing provision of the Court. On the contrary, on August 21, 1978, the Detroit Board filed its Proposed Pupil Reassignment Plan which was intended to be implemented with a bilingual-sensitive pupil assignment policy.

Based upon a review of the record, the Court of Appeals

concluded that the Detroit Board adequately represented the purported interest of intervenors by stating:

> "We have every reason to believe the Board has and will continue to observe the court's order. Given the Board's demonstrated concern for preserving its bilingual programs, we think the appellants' interest already is adequately represented. Accordingly, we affirm the district court's decision that appellants are not entitled to intervene of right." [Ca 34a].

Having concluded that petitioners were not entitled to intervene of right, the Court of Appeals determined that the District Court did not abuse its discretion by denying permissive intervention in the remedy stage of proceedings. The perceived basis for denial of permissive intervention under Rule 24b of the FRCP was the inherent delay which would be occasioned without producing any counterveiling benefit. [Ca 34a].

Read in its entirety, the decision of the Court of Appeals affirming the denial of intervention does not result in a conflict with other federal courts of appeal. The decisions offered by petitioners do not stand for the proposition that intervention under the facts presented here, is required. While the Court of Appeals might have properly exercised its discretion by granting permissive intervention, it cannot be said that it was an abuse of discretion to have denied permissive intervention in this matter.

A review on Writ of Certiorari is not a matter of right. Such a review rests on sound judicial discretion and is granted only when there are special and important reasons advanced. The LULAC Intervenors have not presented a case which is in conflict with a decision of another federal court of appeals; nor have they presented a case which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Fur-

thermore, in light of the fact that petitioners have been accorded an *amicus* status in future remand proceedings to assist in evaluating any reassignments of Hispanic students, the protection of Hispanic interests has been safeguarded.[5]

Petitioners have thus failed to set forth the threshold requirements for vesting jurisdiction in this Court and their petition should accordingly be denied.

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[5] In the companion case decided by the Sixth Circuit on April 14, 1980 and which is the subject matter of separate petitions in this court being Nos. 80-31 and 80-48, the Court held that the LULAC Intervenors here must be permitted to intervene to present evidence on the question of whether the defendants practiced *de jure* segregation of Hispanics. Depending upon the results of the inquiry, the trial court will then be in a position to determine whether to treat Hispanics as "white" or "minority". The Detroit Board contends there is no basis for such a requirement by the Court of Appeals. However, that issue is not a part of this matter although Plaintiffs' consolidated Brief In Opposition To Certiorari tends to blur this distinction.

CONCLUSION

For the foregoing reasons, the Petition of LULAC Council No. 11054, et al for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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